

SULLIVAN HILL REZ & ENGEL
A Professional Law Corporation
James P. Hill, SBN 90478
Gary B. Rudolph, SBN 101921
Kathryn A. Healy, SBN 279602
600 B Street, Suite 1700
San Diego, California 92101
Telephone: (619) 233-4100
Fax Number: (619) 231-4372

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Attorneys for James L. Kennedy, Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re

SANDRA J. FISHER,

Debtor.

CASE NO. 17-05317-LA7

Chapter 7

**TRUSTEE'S MOTION TO SELL
INTEREST IN PUREWICK STOCK
PAYMENT RIGHTS**

AND

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: May 9, 2019

Time: 2:00 p.m.

Dept.: 2

Hon. Louise DeCarl Adler

MOTION TO SELL INTEREST IN PUREWICK STOCK PAYMENT RIGHTS

On August 31, 2017 the debtor filed a Chapter 13 bankruptcy case. The Chapter 13 case was converted to a Chapter 7 on May 24, 2018 and James L. Kennedy was appointed interim trustee of the debtor's Chapter 7 bankruptcy case ("Trustee"). The Trustee is now the permanent trustee and is so acting.

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1 In the debtor's Statement of Financial Affairs and Schedule of Assets and
 2 Liabilities the debtor identified in Schedule A/B 53 periodic payments relating to the
 3 sale of the Purewick Stock valued at \$30,000. In Schedule C [ECF 1] filed August 31,
 4 2017, the debtor listed as an exemption her interest in the periodic payments relating
 5 to the sale of the Purewick Stock. Thereafter in an amendment filed November 29,
 6 2017 [ECF 23] the Debtor amended Schedule C and deleted her exemption in the
 7 payments related to the sale of Purewick Stock.

8 The debtor, while employed at Purewick Corporation ("Purewick"), as a
 9 Quality Safety Manager, received employee incentive stock options that equated to
 10 250 shares of stock in Purewick. Purewick was acquired in a merger by C.R. Board
 11 and stock options were accelerated. No stock was ever issued – instead the share
 12 purchase rights were turned into payment rights ("Purewick Stock Payment Rights").

13 The debtor has offered to buy the Purewick Stock Payment Rights for \$20,000
 14 subject to overbid as set forth below:

15 A. At any time prior to seven (7) calendar days before the hearing on
 16 the Sale of the Purewick Stock Payment Rights ("Sale Hearing"),
 17 any party interested in participating in the sale as a potential
 18 overbidder (other than Debtor) must become a "Qualified
 Overbidder" by:

- 19 1. Providing Notice to the Trustee, identifying the proposed
 20 purchaser and providing sufficient information regarding the
 21 proposed purchaser and the proposed acquisition
 22 consideration to enable the Trustee to evaluate the capability
 23 of the proposed purchaser to complete the transaction and
 the feasibility and valuation of the proposed consideration;
- 24 2. Depositing with the Trustee a cashier's check drawn on a
 25 California Bank or wire transfer in the amount of Twenty-
 26 Two Thousand Five Hundred Dollars (\$22,500.00) ("Bidder
 27 Deposit"). If the Qualified Overbidder is the successful
 28 bidder, the Bidder Deposit shall be applied and credited
 toward payment of the purchase price at the Closing. If the
 Qualified Overbidder is not the successful bidder, the Bidder
 Deposit shall be refunded to the Qualified Overbidder within

1 fifteen (15) calendar days following entry of the order
2 approving the Sale.

3 3. Executing an Overbidder Agreement in substantially the
4 same form of the Asset Purchase Agreement (“APA”);

- 5 B. Buyer and any Qualified Overbidders and/or their qualified
6 representatives must be present to participate in the overbid
7 process by making a personal appearance at the Sale Hearing.
- 8 C. If there is an overbid and the successful Overbidder does not
9 consummate the sale the Trustee will be able to offer the property
10 to the next highest Overbidder without further notice to creditors.
- 11 D. If one or more potential overbidders have become a Qualified
12 Overbidder, as provided above, the Trustee will request at the Sale
13 Hearing that the Bankruptcy Court conduct an overbid of the
14 Purewick Stock Payment Rights. If no Qualified Overbidder is
15 present, the Bankruptcy Court shall be requested to enter a Sale
16 Approval Order (as defined below) approving the Debtor as the
17 winning bidder. If a Qualified Overbidder complies with the
18 requirements set forth above, an Overbid Sale shall be conducted
19 by the Trustee at the Sale Hearing and at such Overbid Sale, the
20 Trustee shall recommend to the Bankruptcy Court that the
21 minimum incremental bid be \$2,500 and the Trustee shall
22 recommend to the Bankruptcy Court limitations on the types of
23 consideration that can be taken into account for purposes of
24 evaluating subsequent bids. An offer for the Purewick Stock
25 Payment Rights shall be preferred to an offer for a portion thereof.
26 An all cash offer shall be preferred to one with a royalty-type
27 payout or other illiquid, non-cash consideration. At the conclusion
28 of the Overbid Sale, Trustee shall designate the increased bid that
is the highest and best bid, which the Trustee will recommend to
the Bankruptcy Court. However, the Trustee shall not be deemed
to have accepted any bid unless and until such bid and Trustee’s
acceptance thereof has been authorized and approved by order of
the Bankruptcy Court (the “Sale Approval Order”).

27 The Purewick Stock Payment Rights are sold in an “as is, where is” condition
28 with no representations or warranties by the Trustee and free and clear of liens,

1 encumbrances and interests which will attach to the sale proceeds in order of their
 2 validity, enforceability, priority and amount 11 U.S.C §363(f). A copy of the Asset
 3 Purchase Agreement (“APA”) is attached as Exhibit “A” to the Declaration of James
 4 L. Kennedy, Chapter 7 Trustee, filed in support hereof (“Kennedy Declaration”).

5 Based on the declaration of Sandra J. Fisher, the negotiations between her and
 6 the Trustee were conducted at arm’s length and occurred without duress, coercion, or
 7 undue influence. The Purewick Stock Payment Rights are being purchased in good
 8 faith pursuant to 11 U.S.C. §363(m).

9 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
 10 **MOTION**

11 **I.**

12 **FACTUAL BACKGROUND**

13 Prepetition the debtor was a quality safety manager at Purewick. In or about
 14 August 2016, she was awarded incentive employee stock options in the total amount
 15 of 250 shares. Purewick was acquired in a merger transaction in or about June 2017.
 16 No stock was ever issued to the employees – instead they were converted into
 17 payment rights. Based on a June 2017 appraisal, the debtor’s shares were valued at
 18 \$252 per share or \$63,000. See ¶ 2 of the Kennedy Declaration.

19 To date, the debtor has received \$20,000 in 2017 at the time of the merger and
 20 another payment of approximately \$20,336.17 in April 2018, prior to the case being
 21 converted to a Chapter 7, which was deposited in an account at Mission Federal and
 22 exempted in Amended Schedule C on May 24, 2018 [ECF 45]. Additionally, during
 23 the Chapter 7, the Trustee received approximately \$1,612.17 in periodic payments
 24 relating to the Purchase Stock Payment Rights. Future payments are dependent on
 25 future sales by the company of a disposable external catheter for women and are
 26 speculative. See ¶3 of the Kennedy Declaration.

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1 II.

2 **SALE OF THE PUREWICK STOCK PAYMENT RIGHTS IS IN THE BEST**
 3 **INTEREST OF THE ESTATE AND A REASONABLE EXERCISE OF THE**
 4 **TRUSTEE’S BUSINESS JUDGMENT**

5 Section 363(b)(1) of the Bankruptcy Code authorizes the Trustee, after notice
 6 and a hearing, to sell property of the estate other than in the ordinary course of the
 7 Debtor’s business. Notice of the proposed sale is required consistent with Rule
 8 6004(a) and (f) of the Federal Rules of Bankruptcy Procedure.

9 Generally, the proposed sale of assets of the estate should be approved if there
 10 is a valid business justification for the sale and if it is in the best interest of the estate.
 11 *In Re 240 N. Brand Partners, Ltd.*, 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996) and *In re*
 12 *Walter*, 83 B.R. 14, 19 (B.A.P. 9th Cir. 1988).

13 The paramount goal in any proposed sale of property of the estate is to
 14 maximize the proceeds received by the estate. *See, In re Mushroom Transp. Co.*, 382
 15 F.3d 325, 339 (3d Cir. 2004); and *Four B. Corp. v. Food Barn Stores, Inc. (In Re Barn*
 16 *Stores, Inc.)*, 107 F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, “a primary
 17 objective of the Code [is] to enhance the value of the estate at hand”).

18 To that end, courts uniformly recognize that procedures to enhance competitive
 19 bidding are consistent with the goal of maximizing the value received by the estate
 20 and therefore are appropriate in the context of bankruptcy transactions. *In re O’Brien*
 21 *Envtl. Energy, Inc.*, 181 F.3d 527, 537 (3d Cir. 1999).

22 The Trustee posits that the overbid procedure outlined herein will expose the
 23 Purewick Stock Payment Rights to the marketplace and thus enhance the likelihood
 24 that the sale will generate the greatest possible return. The sale is being noticed to the
 25 attorney for Purewick believing that the most likely audience interested in purchasing
 26 the Purewick Stock Payment Rights are existing employees at Purewick. See ¶4 of
 27 the Kennedy Declaration. It is projected that Notice of the Sale will be posted on the
 28

1 NABT website. The Purewick Stock Payment Rights will be sold in an “as is, where
2 is” condition.

3 Pursuant to the declaration of the debtor, the Trustee respectfully requests the
4 court determine, that the negotiation for the sale of the Purewick Stock Payment
5 Rights occurred in an arm’s length transaction without duress, coercion or undue
6 influence and that the debtor is buying the Purewick Stock Payment Rights in good
7 faith. 11 U.S.C. §363(m). Accordingly, the Trustee’s sale of the Purewick Stock
8 Payment Rights, subject to overbid, is a proper exercise of his business judgment and
9 the performance of his duties under Section 704(a)(1) of the Bankruptcy Code.

10 **III.**

11 **THE PUREWICK STOCK PAYMENT RIGHTS SHOULD BE SOLD**
12 **FREE AND CLEAR OF LIENS**

13 Section 363(f) of the Bankruptcy Code provides:

14 The trustee may sell property under subsection (b) or (c) of this section
15 free and clear of any interests in such property of an entity other than the
16 estate, only if–

17 (1) applicable nonbankruptcy law permits sale of such property free and
18 clear of such interest;

19 (2) such entity consents;

20 (3) such interest is a lien and the price at which such property is to be
21 sold is greater than the aggregate value of all liens on such property;

22 (4) such interest is in bona fide dispute; or

23 (5) such entity could be compelled, in a legal or equitable proceeding, to
24 accept a money judgment of such interest.
25

26 11 U.S.C. § 363(f). Section 363(f) is written in the disjunctive. Therefore, satisfaction
27 of any one of the five conditions is sufficient to sell property free and clear of any
28 interests in such property.

1 Attached as Exhibit "A" to the Rudolph Declaration is a UCC-1 Financing
2 Statement recorded by Contractor Managing General Insurance Agency, Inc.
3 ("Contractor"), on September 12, 2016, as document no. 16-7545783864. It
4 references a lien on collateral described in paragraph 7 of a General Indemnity
5 Agreement attached to the UCC-1 Financing Statement. However, none of the
6 collateral identified in paragraph 7 encumbers general intangibles which would
7 include the Purewick Stock Payment Rights. Accordingly, the lien of Contractor is in
8 bonafide dispute pursuant to 11 U.S.C. §363(f)(4).

9 Additionally, attached as Exhibit "B" to the Rudolph Declaration is a Notice of
10 Judgment Lien recorded by Gateway Commercial Finance, LLC ("Gateway") on June
11 8, 2017, as document no. 17-7589805757. The underlying bankruptcy was filed
12 August 31, 2017. As a result, the Notice of Judgment Lien was recorded within 90
13 days of the bankruptcy filing and is arguably an avoidable preference pursuant to 11
14 U.S.C. §547(b). Further, pursuant to Section 697.530 of the California Code of Civil
15 Procedure, a judgment lien does not encumber general intangibles. Therefore, the
16 judgment lien of Gateway is in bonafide dispute pursuant to 11 U.S.C. §363(f)(4).

17 Accordingly, the Purewick Stock Payment Rights can be sold free and clear of
18 the liens of Contractor and Gateway.

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IV.

CONCLUSION

It is respectfully requested that the Trustee's Motion to sell the debtor's interest in the Purewick Stock Payment Rights be approved as set forth herein.

Respectfully submitted.

Date: April 9, 2019

SULLIVAN HILL REZ & ENGEL
A Professional Law Corporation

By: /s/Gary B. Rudolph
Gary B. Rudolph
Attorneys for James L. Kennedy,
Chapter 7 Trustee